



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 1

RIN 2900-AQ27

Release of Information from Department of Veterans Affairs' Records

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs' (VA) regulations governing the submission and processing of requests for information under the Freedom of Information Act (FOIA) and the Privacy Act to reorganize, streamline, and clarify existing regulations.

DATES: This rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Catherine Nachmann, Attorney, Office of General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 461-7742 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On April 5, 2018, VA published a proposed rule in the Federal Register [83 FR 14613]. We proposed to amend VA's regulations pertaining to release of information under 5 U.S.C. 552 and implementation of the FOIA, codified at 38 C.F.R. 1.550 through 1.562. We proposed to update VA's FOIA

regulations to implement amendments in the FOIA Improvement Act of 2016, Public Law 114-185, and those governing release of information from claimant records protected under the Privacy Act of 1974, namely 38 CFR 1.577 (c) and (e) and 1.580. In addition to complying with statutory changes, we proposed to amend the regulations to clarify sections as needed and streamline VA processes regarding release of information, thus making it easier for the requester to follow the agency's procedures.

We received comments from four commenters that both supported the proposed rule and recommended modifications of the proposed rule; one comment was received in duplicate. To clarify, we received total of four comment submissions from four separate commenters. We address each of the recommendations below as we sequentially discuss the relevant provisions.

The first commenter suggested that VA add the definition of FOIA public liaison to the "definitions" section, based on the liaison's increased role in the FOIA process. The commenter suggested that VA use the following definition: "FOIA public liaison means a supervisory agency FOIA official who assists in the resolution of any disputes between the requester and the agency." We agree that adding the definition of FOIA public liaison in the definitions section will assist requesters in identifying individuals potentially involved in the FOIA process; accordingly, we accept this suggestion and will add "FOIA public liaison" to § 1.551. We note that the proposed rule included reference to FOIA public liaison in § 1.556 and § 1.557; in addition, current § 1.551 references the availability of FOIA public liaisons to assist in resolution of disputes between the agency and the requester. Incorporating the definition, therefore, merely elaborates upon the term as presented in VA's FOIA regulations. Accordingly, the addition of this definition

is within the scope of the FOIA regulations and is a logical outgrowth of the proposed rule.

The commenter also advised that VA's definition of "request" may be confusing because it provides that the term request includes "any action emanating from the initial demand for records, including an appeal related to the initial demand." We agree that use of the term "appeal" within the definition of "request" may be confusing; accordingly, we revised the definition in § 1.551. The revision of the definition is a clarification of the current definition and is not a significant alteration of the proposed rule.

The second commenter expressed dissatisfaction with the current VA FOIA web page and suggested that VA engage in usability testing and other means of testing user experience. We note in response that VA Office of Privacy and Identity Protection is revising the VA FOIA web page and in doing so, will address the concerns expressed by the commenter. Regarding usability testing, VA will test the FOIA site to ensure that it is working properly, although VA does not have a specific program to regularly test the site. In the event an issue is identified when VA tests the site, however, the issue will be addressed and resolved. The commenter also suggested that we write the regulations in plain language; we agree and endeavor to write in plain language to the extent possible.

The third commenter objected to the absence of changes to §1.553; the commenter argued that VA should revise the section in its entirety. The commenter stated that proactive disclosures are not discretionary disclosures because they are triggered by statute, and supplied sample language as provided in the DOJ OIP FOIA

regulation template. We note that these comments are beyond the scope of the proposed rule; as a matter of courtesy, we stress nonetheless that current §1.553 specifically addresses the disclosure of records required by the FOIA. The section then separately addresses disclosure of records at VA discretion. Accordingly, we believe that §1.553 is in keeping with the letter and spirit of the FOIA and requires no revision.

The third commenter also observed that proposed § 1.554(d) and the sections following it do not comply with the Department of Justice (DOJ) Office of Information Policy (OIP) template regarding requirements for making a request. The commenter also pointed out that § 1.554 does not contain language offering the services of a FOIA Public Liaison. In response to the allegation here and throughout this commenter's submission pertaining to VA's adherence to the OIP regulation template, VA responds that, as noted on the DOJ website, the OIP regulation template provides guidelines and sample language for agencies as they address the key elements of each section. The template does not require agencies to use the identical format or language in drafting its own agency regulations. Currently, we are revising VA's FOIA regulations to make them consistent with the FOIA Improvement Act of 2016; simultaneously, we are revising some provisions based on our experience in implementing the existing regulations. While we appreciate the usefulness of the template in certain circumstances, we conclude that our proposed rule represents a revision of and improvement to the current regulations consistent with current law and policy and that revising to mimic the template verbatim is not necessary.

As to the commenter's statement that VA does not include language in § 1.554 regarding the services of a FOIA Public Liaison, we point out that the availability of

FOIA Public Liaisons is described in § 1.552; further, requesters are advised of the availability of FOIA Public Liaisons in their initial agency determinations pursuant to §§ 1.554 (d) and (e). VA also intends to make information regarding FOIA Public Liaisons available on its FOIA home page and in internal agency guidance as necessary. Overall, we are satisfied that the notification of the availability of FOIA Public Liaisons as contained in the current regulation is consistent with the FOIA.

The third commenter further suggested that the requester's right to request records in a particular form or format should be included § 1.554 rather than § 1.557 ("Responses to requests"), based on the location of the information in the OIP template. First, we note that the comment is beyond the scope of the proposed rule. In addition, we refer to our response above regarding the requirement to follow the OIP template verbatim. Lastly, as a matter of courtesy, we note in response that as currently written, VA FOIA regulations address the issue of the form or format of responsive records in a manner that sufficiently advises the requester of his or her right to receive records in a specific format. Accordingly, we decline to revise the regulation based on this comment.

In addition, this commenter noted that § 1.554 does not contain a paragraph dedicated to "customer service," to include notifying requesters of the availability of FOIA Public Liaisons. In response, we refer first to our discussion above regarding FOIA Public Liaisons. As to customer service generally, we conclude that VA regulations provide sufficient customer service in various forms; the regulations, for example, provide guidance regarding how and where to send a FOIA request, information that the request must contain, and information pertaining to the FOIA

process. The regulations also describe the FOIA Officers' duties, including an obligation to communicate with the FOIA requester. In view of the totality of VA's FOIA regulations, we believe that no additional revisions are necessary in this regard.

The first commenter suggested that VA include in § 1.554(c) a description of the distinction between requests under the FOIA and those under the Privacy Act, as follows: "The Freedom of Information Act applies to the third-party requests for documents concerning the general activities of the Government and of VA in particular. When a U.S. citizen or an individual lawfully admitted for permanent residence requests access to his or her own records, it is considered a Privacy Act request. Such records are maintained by VA under the individual's name or personal identifier. Although requests are considered either FOIA requests or Privacy Act requests, agencies process requests in accordance with both laws, which provides the greatest degree of lawful access while safeguarding an individual's personal privacy." We agree that including such a distinction in VA FOIA regulations is useful, but we believe that it is more appropriately placed at the beginning of VA FOIA regulations. Accordingly, we added the language in § 1.550 (b).

The first commenter also noted that the language of proposed § 1.556 (c)(1), i.e., "Where an extension of more than 10 business days is needed..." does not comply with the FOIA, as the FOIA does not permit an extension beyond 30 business days simply by notifying the requester and giving him or her the opportunity to modify the request. The commenter offered the following language in its place: "Where the extension exceeds 10 working days, the agency must, as described by the FOIA, provide the

requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request.”

The language used by VA in the current regulation was not intended to imply that an extension beyond 30 days was consistent with the FOIA. Given that the proposed language could be read that way, however, we agree with the commenter’s suggested revision and we revised the section consistent with the language provided. We believe the revised language merely clarifies the intended meaning of the section and is not a significant change to the proposed rule.

Further, the first commenter suggested that under § 1.556 (c)(iii), it was unclear whether the term “components” referred to VA components. The commenter suggested that we insert “VA” prior to “components” in order to clarify. We agree with the comment and inserted “VA” for clarification. The revision represents a clarification only and is not a significant change to the proposed rule.

The third commenter suggested that VA add the following language in § 1.557(a) after providing that the FOIA Officer will advise the requester of the receipt of the FOIA request and a FOIA request number: “...*if it will take longer than 10 working days to process. Agencies must include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests....*” VA agrees that providing information to the FOIA requester is useful in the FOIA request process; VA regulation § 1.557(a) provides that the VA FOIA Officer will advise the requester of the receipt of the request and will provide the requester with the assigned FOIA request number to allow the requester to track the request. We believe that as it

stands, § 1.557(a) complies with both the letter and the spirit of the FOIA and provides adequate information to the requester. Accordingly, we do not believe that additional modification to the language is necessary.

In addition, the third commenter suggested that VA remove of § 1.557(b) based on its non-compliance with the FOIA improvement Act of 2016. We find this comment to be outside the scope of the proposed rule. In response nevertheless, we conclude that § 1.557(b) is consistent with both the letter and the spirit of the FOIA and that no deletion is required. The commenter otherwise objects generally to § 1.557's lack of conformance to the OIP template for agency FOIA regulations and suggests that parts of the section be moved elsewhere. In this regard, we refer to our response above regarding OIP regulation template guidance.

The first commenter suggested that VA add language in subsection 1.557(d), “grants of requests in full,” regarding appeal rights and information about OGIS. Upon review, we agree that including the additional information is useful. Accordingly, we added appeal and mediation rights to subsection 1.557(d). This revision is an extension or outgrowth in this regard, and does not represent a substantial alteration of the proposed rule.

The first commenter also noted that in section 1.557 (e)(5), the word “public” is missing from the phrase “FOIA Public Liaison.” VA corrected this oversight. The revision is not a significant change to the proposed rule.

The third commenter suggested that the term “business information” as used in § 1.551 should be replaced with “confidential commercial information” because the latter

term “supplanted” the term “business information” in 2003. In response, we point out that when VA revised its regulations in 2011, we purposefully replaced the term “confidential commercial information” with “business information.” We concluded at that time that the change used plain language and permitted individuals to get a clear idea at the outset whether their request would involve such information. We still believe that the use of “business information” more effectively allows individuals to find relevant provisions in VA’s regulations. Accordingly, we believe that revising the term to “confidential commercial information” in this section is not necessary.

The third commenter also stated that the VA is not compliant with FOIA Improvement Act of 2016 in § 1.559 unless it includes language in the appeals section that refers to the availability of dispute resolution services with OGIS. In addition, the first commenter noted that written appeal notices should also notify the requester of dispute resolution services offered by OGIS; the commenter suggested adding the following language to section (e), Responses to appeals: “Dispute resolution is a voluntary process. If an agency agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.”

In response, we point out that VA appeal letters contain language notifying the requester of the option to pursue dispute resolution services with OGIS, although the regulations do not contain specific direction to do so. We believe that inclusion of the language in final agency decisions satisfies the requirements under the FOIA and that more specific direction as to the requester’s option regarding dispute resolution services is more appropriate for inclusion in a policy document.

The third commenter stated that VA's section regarding FOIA fees, § 1.561, should begin by acknowledging that VA fee regulations must comply with OMB Fee Guidelines. In response, we note that VA's FOIA fee section addresses the requirements imposed by FOIA and OMB fee guidelines. We believe specific reference to the OMB fee guidelines at the outset of the regulation is superfluous; accordingly, we decline the commenter's suggestion in this regard.

The first commenter suggested that VA add the definition of "fee waiver" to the "definitions" provided in § 1.561; the commenter noted that even experienced requesters can be confused between requester category and fee waiver. We agree that addition of the definition is beneficial and revised the "definitions" section to include "fee waiver." The revision is a natural outgrowth of the proposed rule in that it simply enlarges information already provided in the proposed rule.

Further, the first commenter noted that § 1.561(f) consists of a table summarizing FOIA requester fee categories, and that the table lists five categories. The commenter further noted that the corresponding § 1.561(c)(2)-(4), identifying fee requester categories, consists of four categories. The commenter suggested that we combine the entries in the chart for Educational Institution and Non-Commercial Scientific Institution to create consistency between the section and the table. We agree with this suggestion and believe that the revision will resolve any confusion that the current structure could cause. Accordingly, we revised § 1.561(f) to combine the categories in the table, per the suggestion. We note that the revision is not significant in that Educational Institution and Non-Commercial Scientific Institution are in the same fee category. The revision is a logical outgrowth and not a significant revision of the proposed rule.

Lastly, with regard to § 1.561(n), the first commenter noted that the FOIA does not require that requesters seeking a fee waiver or reduction respond to the agency with additional information within 10 days or their fee waiver or reduction request will be closed. The commenter observed that other agencies that have a similar regulation allow 30 days and recommended that VA do the same.

Upon consideration of this comment, VA notes that section (n)(1) relates to fee waiver or reduction requests. The section provides that the requester must provide adequate justification for the waiver or reduction. The additional 10 business days that the FOIA Officer may afford the requester under this section is based on the FOIA Officer's exercise of his or her discretion upon consideration of the information provided in support of the fee waiver request. Given that the requester is responsible for submitting justification at the outset, we believe that in those instances where additional information is needed, an additional 10 business days is sufficient. Accordingly, we decline to revise the regulation based on this comment.

Finally, the third commenter noted that § 1.580(c) fails to cite statutory authority for the change articulated in the proposed rule and questions why VA is "...allowed to NOT respond to Privacy Act requests for access ... and then amend errors that are causing bad decisions affecting Veterans – and not call it an OGC appealable denial of access?"

In response, we first point out that the authority cited in the current regulation, 38 USC 501, supports VA's revision. Section 501 provides that the Secretary has the authority to prescribe rules and regulations that are necessary or appropriate to carry

out the laws administered by VA. In addition, the regulation does not “allow VA to NOT respond...” Rather, the regulation clarifies that § 1.580 applies to a written denial of a request rather than the absence of a denial. The requester has the right to appeal a written denial of access to OGC.

The fourth and final commenter suggested that VA add language to § 1.577 that is similar to the language of § 1.554(d)(3), providing that if the requester does not reasonably describe the records being sought, VA will provide the requester the opportunity to modify the request to meet the elements required for a perfected request.

We accept the commenter’s suggestion and added language similar to that in § 1.577 with regard to requests under the Privacy Act.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule concerns the procedures for requesting information from VA and the payment of certain fees for processing such requests. The fees prescribed by this final rule will generally comprise

only an insignificant portion of a small entity's expenditures. Therefore, this final rule is exempt, pursuant to 5 U.S.C. 605(b), from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866, 13563 and 13771

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 12866, Regulatory Planning and Review, defines "significant regulatory action" to mean any regulatory action that is likely to result in a rule that may: "(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action and determined that the action is not a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 through FYTD. This proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on state, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

There is no Catalog of Federal Domestic Assistance number for the program affected by this final rule.

List of Subjects in 38 CFR Part 1

Administrative Practice and Procedure, Archives and Records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government Contracts, Government Employees, Government Property, Infants and Children, Inventions and Patents, Parking, Penalties, Privacy, Reporting and Recordkeeping Requirements, Seals and Insignia, Security Measures, and Wages.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on March 14, 2019, for publication.

Dated: March 26, 2019

Consuela Benjamin,
*Regulations Development Coordinator,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.*

For the reasons stated in the preamble, VA amends 38 CFR part 1 as follows:

PART 1—GENERAL PROVISIONS

1. The authority citation for part 1 continues to read as follows:

Authority: 38 U.S.C. 501(a), and as noted in specific sections.

2. In § 1.519, revise paragraph (c) to read as follows.

§ 1.519 Lists of names and addresses.

* * * * *

(c) The Associate Deputy Assistant Secretary for Information Resources Management is authorized to release lists of names and addresses to organizations which have applied for such lists in accordance with paragraph (a) of this section, if he or she finds that the purpose for which the organization desires the names and addresses is directly connected with conduct of programs and the utilization of benefits under title 38 U.S.C. Lists of names and addresses authorized to be released pursuant to this paragraph shall not duplicate lists released to other elements, segments, or chapters of the same organization.

* * * * *

3. In § 1.550, revise paragraph (b) to read as follows:

§ 1.550 Purpose.

* * * * *

(b) Requests for records about an individual, protected under the Privacy Act, 5 U.S.C. 552a, including one's own records and records that pertain to an individual and that may be sensitive, will be processed under the FOIA and the Privacy Act. The FOIA applies to third-party requests for documents concerning the general activities of the Government and of VA in particular. When a U.S. citizen or an individual lawfully admitted for permanent residence requests access to his or her own records, it is considered a Privacy Act request. Such records are maintained by VA under the individual's name or personal identifier. Although requests are considered either FOIA requests or Privacy Act requests, agencies process requests in accordance with both laws, which provides the greatest degree of lawful access while safeguarding an individual's personal privacy. In addition to the following FOIA regulations, see 1.575 through 1.584 for regulations applicable of Privacy Act records.

* * * * *

4. In § 1.551, add in alphabetical order a definition for "FOIA public liaison" and revise the definition of "request" to read as follows:

§ 1.551 Definitions.

* * * * *

FOIA Public Liaison means a supervisory agency FOIA official who assists in the resolution of any disputes between the requester and the agency.

* * * * *

Request means a written demand for records under the FOIA as described § 1.554(a).

The term request includes any action emanating from the initial demand for records, including any subsequent action related to the request.

* * * * *

5. In § 1.552, revise paragraph (a) to read as follows:

§ 1.552 General provisions.

(a) *Additional information.* Information regarding VA's FOIA and Privacy Act process generally, including how to file FOIA requests, and information made available by VA under the FOIA, is available at the following Internet address:
<http://www.oprm.va.gov/foia/>.

* * * * *

6. In § 1.554, revise paragraphs (a) through (c), (d)(2) and (4), and (e) to read as follows:

§ 1.554 Requirements for making requests.

(a) *Requests by letter and facsimile (fax).* The FOIA request must be in writing and may be by letter or fax. To assist in processing, the request letter, envelope, or fax cover sheet of any FOIA request should be marked "Freedom of Information Act Request." Information helpful for filing a request, such as a list of VA FOIA contacts, VA's FOIA Reference Guide, and the text of the FOIA, are available on VA's FOIA homepage on the Internet. See § 1.552(a) for the pertinent Internet address. VA has a

decentralized FOIA system, meaning that each VA component, i.e., administrations and staff offices, the Veterans Health Administration (VHA) medical centers, Veterans Benefits Administration (VBA) regional offices, or offices located within the VA Central Office in Washington, DC (e.g., the Office of the Secretary), maintain their own FOIA processes and respond to FOIA requests directly. Accordingly, requesters must write directly to the FOIA Officer for the VA component that maintains the records. If requesting records from a particular medical facility, regional office, or Central Office component, the request should be sent to the FOIA Office at the address listed for that component. A legible return address must be included with the FOIA request; the requester may wish to include other contact information as well, such as a telephone number and e-mail address. If the requester is not sure where to send the request, he or she should seek assistance from the FOIA Contact for the office believed to manage the programs whose records are being requested or, if these efforts fail, he or she should send the request to the Director, FOIA Service (005R1C), 810 Vermont Avenue, NW, Washington, DC 20420, who will refer it for action to the FOIA contact at the appropriate component.

(b) *Requests by e-mail.* VA accepts e-mail FOIA requests. To assure prompt processing, e-mail FOIA requests must be sent to official VA FOIA mailboxes established for the purpose of receiving FOIA requests. An e-mail FOIA request that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA request. Mailbox addresses designated to receive e-mail FOIA requests are available on VA's FOIA homepage. See § 1.552(a) for the pertinent Internet address.

(c) *The content of a request.* Whether submitting the request by letter, fax, or e-mail, the following applies: if the requester is seeking records about himself or herself or to which a confidentiality statute applies (38 U.S.C. 5701, e.g.), the requester must comply with the verification of identity requirements set forth in § 1.577 of this part, which applies to requests for records maintained under the Privacy Act. If the requester is seeking records not covered by the Privacy Act, but which the requester believes may pertain to him or her, the requester may obtain greater access to the records by complying with the verification of identity requirements set forth in § 1.577 of this part, by providing the image of the requester's signature (such as an attachment that shows the requester's handwritten signature), or by submitting a notarized, signed statement affirming his or her identity or a declaration made in compliance with 28 U.S.C. 1746. The suggested language for a statement under 28 U.S.C. 1746 is included on VA's FOIA homepage; see § 1.552(a) for the pertinent Internet address. If the requester is seeking records pertaining to another individual under the FOIA, whether by letter, fax, or e-mail, the requester may obtain greater access to the records if he or she provides satisfactory authorization to act on behalf of the record subject to receive the records or by submitting proof that the record subject is deceased (e.g., a copy of a death certificate or an obituary). Each component has discretion to require that a requester supply additional information to verify that a record subject has consented to disclosure.

(d) * * *

(2) Requests for voluminous amounts of records may be placed in a complex track of a multitrack processing system pursuant to § 1.556(b); such requests also may meet the criteria for "unusual circumstances," which are processed in accordance with §

1.556(c) and may require more than 20 business days to process despite the agency's exercise of due diligence.

* * * * *

(4) The time limit for VA to process the FOIA request will not start until the FOIA Officer determines that the requester has reasonably described the records sought in the FOIA request. If the FOIA Officer seeks additional clarification regarding the request and does not receive the requester's written response within 30 calendar days of the date of its communication with the requester, he or she will conclude that the requester is no longer interested in pursuing the request and will close VA's files on the request.

(e) *Agreement to pay fees.* The time limit for processing a FOIA request will be tolled while any fee issue is unresolved. Depending on the circumstances, the FOIA Officer will notify the requester of the following: that the FOIA Officer anticipates that the fees for processing the request will exceed the amount that the requester has stated a willingness to pay or will amount to more than \$25.00 or the amount set by Office of Management and Budget fee guidelines, whichever is higher; whether the FOIA Officer is requiring the requester to agree in writing to pay the estimated fee; or whether advance payment of the fee is required prior to processing the request (i.e., if the estimated fee amount exceeds \$250 or the requester previously has failed to pay a FOIA fee in a timely manner). If the FOIA Officer does not receive the requester's written response to the notice regarding any of these items within 10 business days of the date of the FOIA Officer's written communication with the requester, the FOIA

Officer will close the request. If requesting a fee waiver under § 1.561, the requester nonetheless may state his or her willingness to pay a fee up to an identified amount in the event that the fee waiver is denied; this will allow the component to process the FOIA request while considering the fee waiver request. If the requester pays a fee in advance, and VA later determines that the requester overpaid or is entitled to a full or partial fee waiver, a refund will be made. (For more information on the collection of fees under the FOIA, see § 1.561.)

* * * * *

7. In § 1.556, revise paragraphs (c)(1) and (d)(3) to read as follows:

§ 1.556 Timing of responses to requests.

* * * * *

(c) ***

(1) FOIA Officers may encounter “unusual circumstances,” where it is not possible to meet the statutory time limits for processing the request. In such cases, the FOIA Officer will extend the 20-business day time limit for 10 more business days and notify the requester in writing of the unusual circumstances and the date by which it expects to complete processing of the request. Where the extension exceeds 10 working days, the agency must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request; notice of the availability of the VA FOIA Public Liaison,

and the right to seek dispute resolution services from the Office of Government Information Services. Unusual circumstances consist of the following:

(i) The need to search for and collect the requested records from field facilities or components other than the office processing the request;

(ii) The need to search for, collect and examine a voluminous amount of separate and distinct records that are the subject of a single request; or

(iii) The need for consultation with another agency or among two or more VA components or another agency having a substantial interest in the subject matter of a request.

* * * * *

(d) * * *

(3) Within 10 calendar days of its receipt of a request for expedited processing, the FOIA Officer shall determine whether to grant the request and will provide the requester written notice of the decision. If the FOIA Officer grants a request for expedited processing, the FOIA Officer shall give the request priority and process it as soon as practicable. If the FOIA Officer denies the request for expedited processing, the requester may appeal the denial, which appeal shall be addressed expeditiously.

8. In § 1.557:

a. Revise paragraphs (a) and (c);

b. Redesignate paragraph (d) as paragraph (e);

c. Add new paragraph (d); and

c. Revise newly redesignated paragraph (e).

The revisions and addition read as follows:

§ 1.557 Responses to requests.

(a) *Acknowledgement of requests.* When a request for records is received by a component designated to receive requests, the component's FOIA Officer will assign a FOIA request number; the FOIA Officer will send the requester written acknowledgement of receipt of the request and will advise the requester of the assigned FOIA request number and how the requester may obtain the status of his or her request.

* * * * *

(c) *Time limits for processing requests.* A component must advise the requester within 20 business days from the date of VA's receipt of the request whether the request is granted in its entirety, granted in part, or denied in its entirety and provide the reasons therefor. If the request must be referred to another component, the response time will begin on the date that the request was received by the appropriate component, but in any event not later than 10 business days after the referring office receives the FOIA request; the referring component has an affirmative duty to refer the FOIA request within 10 business days.

(d) *Grants of requests in full.* When a component makes a determination to grant a request in full, it shall notify the requester in writing. The component also shall inform

the requester of any fees charged under §1.561. The component also must inform the requester of his or her right to appeal and to seek mediation or the assistance of the appropriate VA FOIA Public Liaison and provide the contact information for the Liaison.

(e) Adverse determinations of requests. When a component makes an adverse determination denying the request in any respect, the component FOIA Officer shall promptly notify the requester of the adverse determination in writing. Adverse determinations include decisions that a requested record is exempt from release in whole or in part, does not exist or cannot be located, is not readily reproducible in the form or format sought by the requester, or is not a record subject to the FOIA; adverse determinations also include denials regarding requests for expedited processing and requests involving fees, such as requests for fee waivers. The adverse determination notice must be signed by the component head or the component's FOIA Officer, and shall include the following:

(1) The name and title or position of the person responsible for the adverse determination;

(2) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied by the FOIA Officer in denying the request;

(3) The amount of information withheld in number of pages or other reasonable form of estimation; an estimate is not necessary if the volume is indicated on redacted pages disclosed in part or if providing an estimate would harm an interest provided by an applicable exemption;

(4) Notice that the requester may appeal the adverse determination and a description of the requirements for an appeal under § 1.559 of this part; and

(5) Notice that the requester may seek assistance or dispute resolution services from the VA FOIA Public Liaison or dispute resolution services from the Office of Government Information Services.

9. In § 1.558, revise paragraphs (c)(3) and (e) to read as follows:

§ 1.558 Business information.

* * * * *

(c) * * *

(3) Whenever the FOIA Officer notifies the submitter of VA's intent to disclose over the submitter's objections, the FOIA Officer will also notify the requester by separate correspondence.

* * * * *

(e) *Consideration of objection(s) and notice of intent to disclose.* The FOIA Officer will consider all pertinent factors, including but not limited to, the submitter's timely objection(s) to disclosure and the specific grounds provided by the submitter for non-disclosure in deciding whether to disclose business information. Information provided by the submitter after the specified time limit and after the component has made its disclosure decision generally will not be considered. In addition to meeting the requirements of § 1.557, when a FOIA Officer decides to disclose business information

over the objection of a submitter, the FOIA Officer will provide the submitter with written notice, which includes:

(1) A statement of the reason(s) why each of the submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date of not less than 10 days from the date of the notice (to allow the submitter time to take necessary legal action).

* * * * *

10. In § 1.559, revise paragraphs (b) through (d) to read as follows:

§ 1.559 Appeals

* * * * *

(b) *How to file and address a written appeal.* The requester may appeal an adverse determination denying the request, in any respect, except for those concerning Office of Inspector General records, to the VA Office of the General Counsel (024), 810 Vermont Avenue, NW, Washington, DC, 20420. Any appeals concerning Office of Inspector General records must be sent to the VA Office of Inspector General, Office of Counselor (50), 810 Vermont Avenue, NW, Washington, DC 20420. The FOIA appeal must be in writing and may be by letter or facsimile (fax); whichever method is used, the appeal must comply with all requirements of this paragraph and paragraph (d). Information regarding where to fax the FOIA appeal is available on VA's FOIA

homepage on the Internet. See § 1.552(a) of this part for the pertinent Internet address.

(c) *How to file an e-mail appeal.* VA accepts e-mail appeals; the appeal must comply with all requirements of this paragraph and paragraph (d) of this section. In order to assure initial processing of an appeal filed by e-mail, the e-mail must be sent to one of the official VA FOIA mailboxes established for the purpose of receiving FOIA appeals; an e-mail FOIA appeal that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA appeal. Mailbox addresses designated to receive e-mail FOIA appeals are available on VA's FOIA homepage. See § 1.552(a) of this part for the pertinent Internet address.

(d) *Time limits and content of appeal.* The appeal to the VA OGC (024) or VA Office of Inspector General (50) must be received or postmarked no later than 90 calendar days after the date of the adverse determination and must contain the following: a legible return address; clear identification of the determination being appealed, including any assigned request number (if no request number was assigned, other information must be provided such as the name of the FOIA officer, the address of the component, the date of the component's determination, if any, and the precise subject matter of the appeal); and identification of the part of the determination that is being appealed (if appealing only a portion of the determination). If the appeal involves records about the requester himself or herself or records to which a confidentiality statute applies, the requester must comply with the verification of identity requirements set forth in § 1.577 of this part, which applies to requests for records maintained under the Privacy Act. If the appeal involves records not covered by the Privacy Act, but

which the requester believes may pertain to him or her, the requester may obtain greater access to the records by complying with the verification of identity requirements set forth in § 1.577 of this part, providing the image of the requester's signature (such as an attachment that shows the requester's handwritten signature), or submitting a notarized, signed statement affirming his or her identity or a declaration made in compliance with 28 U.S.C. 1746. The suggested language for a statement under 28 U.S.C. 1746 is included on VA's FOIA homepage. See § 1.552(a) of this part for the pertinent Internet address. If the appeal involves records pertaining to another individual (i.e., the requester is not the record subject), the requester may obtain greater access to the records if he or she provides satisfactory authorization to act on behalf of the record subject to receive the records or by submitting proof that the record subject is deceased (e.g., a copy of a death certificate or an obituary). Each component has discretion to require that a requester supply additional information to verify that a record subject has consented to disclosure. Appeals should be marked "Freedom of Information Act Appeal." The requester may include other information as well, such as a telephone number and e-mail address and a copy of the initial agency determination. An appeal is not perfected until VA either receives the required information identified above or the appeal is otherwise easily and sufficiently defined. The designated official within the Office of the General Counsel (024) will act on behalf of the Secretary on all appeals under this section, except those pertaining to the Office of Inspector General. The designated official in the Office of Inspector General will act on all appeals pertaining to Office of Inspector General records. A determination by the Office

of General Counsel, or designated official within the Office of Inspector General, will be the final VA action.

* * * * *

11. Amend § 1.561 by:

- a. Revising paragraphs (a) and (b)(3);
- b. Adding paragraph (b)(1);
- c. Revising paragraphs (d)(2) and (e);
- d. Revising paragraphs (f), (g) introductory text, and (g)(1);
- e. Removing and reserving paragraph (g)(2), and
- f. Revising paragraphs (h), (i), (l)(3) and (5), and (n)(1).

The revisions and additions read as follows:

§ 1.561 Fees.

(a) *General.* VA will charge for processing requests under the FOIA, as amended, and in accordance with this section. Requesters must pay fees by check or money order made payable to the Treasury of the United States. Payment by credit card also may be acceptable; the requester should contact the FOIA Officer for instructions on credit card payments. Note that fees associated with requests from VA beneficiaries, applicants for VA benefits, or other individuals, for records retrievable by their names or individual identifiers processed under 38 U.S.C. 5701 (records associated with claims for benefits) and 5 U.S.C. 552a (the Privacy Act), will be

assessed fees in accordance with the applicable regulatory fee provisions relating to VA benefits and VA Privacy Act records.

(b) * * *

(3) *Direct costs* mean expenses that VA incurs in responding to a FOIA request; direct costs include searching for and duplicating (and in the case of commercial use requesters, reviewing) records to respond to a FOIA request, the hourly wage of the employee performing the work plus 16 percent of the hourly wage, and the cost of operating duplication machinery. Direct costs do not include overhead expenses, such as the costs of space or heating and lighting of the facility where the records are kept.

* * * * *

(10) *Fee waiver* means waiving or reducing processing fees if a requester can demonstrate that certain statutory standards are satisfied, including that the information is in the public interest and is not requested for commercial interest.

* * * * *

(d) * * *

(2) *Duplication*. When the agency provides duplicated records in response to a request, no more than one copy will be provided.

* * * * *

(e) *Limitations on charging fees*. (1) When VA determines that a requester is an educational institution, a non-commercial scientific institution, or a representative of the news media, VA will not charge search fees.

(2) VA charges fees in quarter hour increments; no search or review fee will be charged for a quarter hour period unless more than half of that period is required for search or review.

(3) VA may provide free copies of records or free services in response to an official request from another government agency or a congressional office and when a component head or designee determines that doing so will assist in providing medical care to a VA patient or will otherwise assist in the performance of VA's mission.

(4)(i) If VA fails to comply with the time limit to respond to a request, it may not charge search fees, or, in cases of requests from requesters described in paragraph (e)(1) of this section, may not charge duplication fees, except as described in paragraph (e)(4)(ii) through (iv) of this section.

(ii) If VA has determined that unusual circumstances as defined by the FOIA apply and has provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(iii) If VA has determined that unusual circumstances as defined by the FOIA apply and more than 5,000 pages are necessary to respond to the request, VA may charge search fees, or in the case of requesters described in paragraph (e)(1) of this section, may charge duplication fees, if the following steps are taken: VA must provide timely written notice of unusual circumstances to the requester in accordance with the FOIA and must discuss with the requester via written mail, e-mail or telephone (and later confirmed in writing) (or have made not less than three good-faith attempts to do

so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. § 552(a)(6)(B)(ii). If this exception is satisfied, the component may charge all applicable fees incurred in the processing of the request.

(iv) if a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(f) The following table summarizes the chargeable fees for each category of requester.

Category	Search fees	Review fees	Duplication fees
(1) Commercial Use	Yes	Yes	Yes
(2) Educational Institution and Non-Commercial Scientific Institution	No	No	Yes (100 pages or 1 disc free)
(3) News Media	No	No	Yes (100 pages or 1 disc free)
(4) All other	Yes (2 hours free)	No	Yes (100 pages or 1 disc free)

(g) *Fee schedule.* If it is determined that a fee will be charged for processing the FOIA request, VA will charge the direct cost to the agency and in accordance with the requester's fee category (see § 1.561(c)); to the extent possible, direct costs are itemized in paragraph 1 of this section. Duplication fees also are applicable to records provided in response to requests made under the Privacy Act (see § 1.577(e),(f)).

(1) Schedule of fees:

Activity	Fees
(i) Duplication of standard size (8½" x 11"; 8½" x 14") paper records or records on electronic media.	Paper records: \$0.15 per page Electronic media: \$3.00 per each compact disc (CD) or digital versatile disc (DVD).
(ii) Duplication of non-paper items (e.g., x-rays), paper records which are not of a standard size (e.g., architectural drawings/construction plans or EKG tracings).	Direct cost to VA.
(iii) Record search by manual (non-automated) methods.	Hourly wage of the employee(s), plus 16 percent.
(iv) Record search using automated methods, such as by computer.	Direct cost to VA.
(v) Record review (for Commercial Use Requesters only).	Hourly rate of employees performing review to determine whether to release records and to prepare them for release, plus 16 percent.
(vi) Other activities, such as: Attesting under seal or certifying that records are true copies; sending records by special methods; forwarding mail; compiling and providing special reports, drawings, specifications, statistics, lists, abstracts or other extracted information; generating computer output; providing files under court process where the Federal Government is not a party to, and does not have an interest in, the litigation.	Direct cost to VA.

Note to paragraph (g)(1): VA will charge fees consistent with the salary scale published by the Office of Personnel Management (OPM).

* * * * *

(h) *Notification of fee estimate or other fee issues.* (1) VA will not charge the requester if the fee is \$25.00 or less.

(2) When a FOIA Officer determines or estimates that the fees to be charged under this section will amount to more than \$25.00 or the amount set by OMB fee guidelines, whichever is higher, the FOIA Officer will notify the requester in writing of the actual or estimated amount of fees and ask the requester to provide written assurance of the payment of all fees or fees up to a designated amount, unless he or she has indicated a willingness to pay fees as high as those anticipated. Any such agreement to pay the fees shall be memorialized in writing. When the requester does not provide sufficient information upon which VA can identify a fee category (see paragraphs (c)(1) through (c)(4) of this section), or a clarification is otherwise required regarding a fee, the FOIA Officer may notify the requester and seek clarification; the notification to the requester will state that if a written response is not received within 10 days, the request will be closed. The timeline for responding to the request will be tolled and no further work will be done on the request until the fee issue has been resolved.

(i) *Charges for other services.* Apart from the other provisions of this section, VA will charge the requester the direct costs of providing any special handling or services requested, such as certifying that records are true copies or sending them by other than ordinary mail. The FOIA Officer may choose to provide such a service as a matter of administrative discretion.

* * * * *

(l) ***

(3) Where the requester previously has failed to pay a properly charged FOIA fee to VA within 30 days of the date of billing, a FOIA Officer may require the requester to pay the full amount due, plus any applicable interest as specified in this section, and to make an advance payment of the full amount of any anticipated fee, before the FOIA Officer begins to process a new request or continues to process a pending request from that requester.

* * * * *

(5) In cases in which a FOIA Officer requires advance payment or payment is due under this section, the time for responding to the request will be tolled and further work will not be done on the request until the required payment is received.

* * * * *

(n) ***

(1) *Waiving or reducing fees.* Fees for processing the request may be waived if the requester meets the criteria listed in this section. The requester must submit adequate justification for a fee waiver; without adequate justification, the request will be denied. The FOIA Officer may, at his or her discretion, communicate with the requester to seek additional information, if necessary, regarding the fee waiver request. If the additional information is not received from the requester within 10 days of the FOIA Officer's communication with the requester, VA will assume that the requester does not wish to pursue the fee waiver request and the fee waiver request will be closed. If the

request for waiver or reduction is denied or closed, the underlying FOIA request will continue to be processed in accordance with the applicable provisions of this Part. Requests for fee waivers are decided on a case-by-case basis; receipt of a fee waiver in the past does not establish entitlement to a fee waiver each time a request is submitted.

* * * * *

12. In § 1.577, revise paragraphs (c) and (e) to read as follows:

§ 1.577 Access to Records.

* * * * *

(c) The VA component or staff office having jurisdiction over the records subject to the Privacy Act request will establish appropriate disclosure procedures, including notifying the individual who filed the Privacy Act request of the time, place, and conditions under which the VA will comply with the request, in accordance with applicable laws and regulations. Access requests for Privacy Act records or information must be sent to the staff office that maintains the records; the individual seeking access may consult the system of record notice (https://www.oprm.va.gov/privacy/systems_of_records.aspx) in order to identify the office to which the request should be sent. Each component has discretion to require that a requester supply additional information to verify his or her identity. If the Privacy Officer determines that the request does not reasonably describe the records being sought, the Privacy Officer will advise the requester how the request is insufficient; the Privacy Officer will provide an opportunity to discuss the

request by documented telephonic communication or written correspondence in order to modify it to clearly identify the records being sought.

(e) Fees to be charged, if any, to any individual for making copies of his or her record shall not include the cost of and search for and review of the record.

Fees under \$25.00 shall be waived. Fees to be charged are as follows:

Activity	Fees
(1) Duplication of documents by any type of reproduction process to produce plain one-sided paper copies of a standard size (8 1/2" × 11"; 8 1/2" × 14"; 11" × 14")	\$0.15 per page after first 100 one-sided pages or electronic equivalent.
(2) Duplication of non-paper records, such as microforms, audiovisual materials (motion pictures, slides, laser optical disks, video tapes, audio tapes, etc.), computer tapes and disks, diskettes for personal computers, and any other automated media output	Direct cost to the Agency as defined in § 1.561(b)(3) of this part to the extent that it pertains to the cost of duplication.
(3) Duplication of document by any type of reproduction process not covered by paragraphs (e)(1) or (2) of this section to produce a copy in a form reasonably usable by the requester	Direct cost to the Agency as defined in § 1.561(b)(3) of this part to the extent that it pertains to the cost of duplication.

13. Revise § 1.580 to read as follows:

§ 1.580 Administrative review.

(a) Upon consideration and denial of a request under §1.577 or §1.579 of this part, the responsible VA official or designated employee will inform the requester *in*

writing of the denial. The adverse determination notice must be signed by the component head or the component's Privacy Officer, and shall include the following:

(1) The name and title or position of the person responsible for the adverse determination;

(2) A brief statement of the reason(s) for the denial and the policy upon which the denial is based; and

(3) Notice that the requester may appeal the adverse determination under paragraph (b) of this section to the Office of General Counsel (providing the address as follows: Office of General Counsel (024), 810 Vermont Avenue, N.W., Washington, DC 20420), and instructions on what information is required for an appeal, which includes why the individual disagrees with the initial denial with specific attention to one or more of the four standards (e.g., accuracy, relevance, timeliness, and completeness), and a copy of the denial letter and any supporting documentation that demonstrates why the individual believes the information does not meet these requirements.

(b) The final agency decision in appeals of adverse determinations described in paragraph (a) of this section will be made by the designated official within the Office of General Counsel (024).

(c) A written denial must have occurred to appeal to OGC. The absence of a response to an access *or* amendment request filed with a VA component is *not* a denial. If an individual has not received a response to a request for access to or amendment of records, the individual must pursue the request with the Privacy Officer of the administration office (e.g., the VHA, VBA, or National

Cemetery Administration Privacy Officer) or staff office (e.g., the Office of Information Technology or Office of Inspector General Privacy Staff Officer) that has custody over the records.

[FR Doc. 2019-06101 Filed: 3/29/2019 8:45 am; Publication Date: 4/1/2019]